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No. 84-993

In The

Supreme Court of the United States

October Term, 1984

GENERAL PUBLIC UTILITIES CORP., METROPOLITAN EDISON CO., JERSEY CENTRAL POWER AND LIGHT CO., PENNSYLVANIA ELECTRIC CO., BABCOCK & WILCOX CO., J. RAY McDERMOTT & CO., CATALYTIC, INC., and BURNS & ROE, INC.,

Petitioners,

v.

STIBITZ, DONALD A., NEW FREEDOM LUMBER CO., INC., RICHARD K. BAADE AND SHIRLEY A. BADDE, HIS WIFE, ALBERT C. GEORGE AND M. ISABEL GEORGE, HIS WIFE, VICTOR HEBEL, P.G. ENGINEERING, CHANCEFORD MANOR VILLAGE SEWAGE CO., CHANCEFORD MANOR VILLAGE WATER CO., INC., DOROTHY S. HOSTETTER, L. RICHARD HARNER AND LINDA HARNER, HIS WIFE, JAMES BARRON AND DIANE BARRON, HIS WIFE, MARGARET MARY JONAS, CUMBERLAND WOODCRAFT COMPANY, INC., POCONO BUSINESS FURNITURE, INC., FORGET-ME-NOT, INC., LARRY WELKER FORD, INC., DR. MAXINE C. BUSH, REV. ALVA ROMPKINS, MUSETTE DUGGAN, WELS I. ZIMMERMAN, HARRY WALLACH, MARY W. HUTCHINSON, STEPHEN M. YOUNG, FMG INVESTMENTS, INC., GETTYSBURG TOURS, INC., HERITAGE INNS, INC., L.E. SMITH WHOLESALE DISTRIBUTORS, INC., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does a prevailing party lack standing to review the dismissal of a Complaint for lack of federal subject matter jurisdiction so as to obtain an advisory opinion from this High Court with regard to the issue of federal subject matter jurisdiction and the merits of the underlying claim?

2. Where all parties now concede, the applicability of state law to claims brought pursuant to the Price-Anderson Act, and the Courts have uniformly held the same, a federal district court, and in the absence of an "extraordinary nuclear occurrence" cannot sustain "arising under" jurisdiction wherein the plaintiffs seek traditional tort damages for injuries sustained as a result of the alleged negligence of utility and non-utility defendants.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are listed in the caption of the case, on motion in the District Court, Chanceford Manor Village Sewage Co., Chanceford Manor Village Water Co., and Mary W. Hutchinson have been voluntarily dismissed.[1]

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1. Pursuant to Rule 28.1 of the Revised Rules of the Supreme Court of the United States, none of the corporate respondents have any parent companies or non-wholly owned subsidiaries or affiliates.

TABLE OF CONTENTS

	Page(s)
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	2
Statement of Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Counter-Statement of the Case	3
Reasons for Denying the Writ	5
CONCLUSION	10
APPENDIX:	
Summary of Argument	A. 1 - A. 2

TABLE OF AUTHORITIES

CASES:	Page(s)
Behrend v. Bell Telephone Co., 242 Pa. Super. 47, (1976), vacated and remanded 473 Pa. 320, 374 A. 2d 536	9
Bell v. Hood, 327 U.S. 678 (1946)	9
Bell Telephone Company v. Pa. PUC, 53 Pa. Comwlth. Ct. 241	9
Bodkin v. United States, 266 F. 2d 55 (2nd Cir. 1959)	6
Byer v. People's Natural Gas Co., 251 Pa. Super. 75 (1977)	9
Charles Dowd Fox Co. v. Courtney, 368 U.S. 502, (1962)	10
Commonwealth v. Creamer, 464 Pa. 2 (1975)	5, 10
Commonwealth of Pennsylvania, et al. v. General Public Utilities Corp., et al., 710 F. 2d 117 (3rd Cir. 1983)	8
Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978)	5, 8
Electrical Fittings Corporation, et al. v. Thomas & Betts Co., et al., 307 U.S. 860 (1939)	6
Feingold v. Bell Telephone Co., 477 Pa. 1, 383 A. 2d 791 (1978)	9
Flast v. Cohen, 392 U.S. 83 (1968)	6
Gravitt Etc., et al. v. Southwestern Bell Telephone Company, et al., 430 U.S. 723 (1977), rehearing denied, 431 U.S. 975 (1977)	7
Griffith v. United Airlines, Inc., 416 Pa. 1, 203 A. 2d 796 (1964)	7
In Re Glenn W. Turner Enterprises Litigation, 521 F. 2d 775 (3rd Cir. 1975)	6

TABLE OF AUTHORITIES (cont.)

Page(s)

In Re Three Mile Island Litigation, 87 R.F.D. 433 (M.D. Pa. 1980) 5

Langnes v. Green, 282 U.S. 531 (1931) 10

Miller v. Reading Co., 292 Pa. 44 (1927) 10

Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615 (1984) ... 8

Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976) 7

Volvo of America Corp. v. Schwarzer, 429 U.S. 1331 (1976) 7

STATUTES:

28 U.S.C. § 1447(d) 7

42 U.S.C. § 2014 5

42 U.S.C. § 2210 5

42 Pa.S.C. § 5310 ..... 4, 5, 7

RULES:

Pa.R.C.P. 213(e)(2) 7

OTHER AUTHORITIES:

S. Rep. No. 296, 85th Cong., 1st Sess. 9, reprinted in 1957 U.S. Code Cong. and Admin. News 1803, 1810 8

S. Rep. No. 1605, 89th Cong., 2nd Sess. 6, reprinted in 1966 U.S. Code Cong. and Admin. News 3201, 3206 9

S. Rep. No. 1605, 89th Cong., 2nd Sess. 9, reprinted in 1966 U.S. Code Cong. and Admin. News 3201, 3209 9

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Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The respondents, Donald A. Stibitz, New Freedom Lumber Co., Inc., Richard K. Baade and Shirley A. Baade, his wife, Albert C. George and M. Isabel George, his wife, Victor Hebel, P.G. Engineering, Dorothy S. Hostetter, L. Richard Harner and Linda Harner, his wife, James Barron

and Diane Barron, his wife, Margaret Mary Jonas, Cumberland Woodcraft Company, Inc., Pocono Business Furniture, Inc., Forget-Me-Not, Inc., Larry Welker Ford, Inc., Dr. Maxine C. Bush, Rev. Alva Rompkins, Musette Duggan, Wels I. Zimmerman, Harry Wallach, Mary W. Hutchinson, Stephen M. Young, FMG Investments, Inc., Gettysburg Tours, Inc., Heritage Inns, Inc., L.E. Smith Wholesale Distributors, Inc., Individually and on behalf of all others similarly situated, respectfully pray this Court deny a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on October 24, 1984.

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OPINIONS BELOW

The opinions below are set forth in the Petition for a Writ of Certiorari at page 2 and in Petitioners' Appendix at A-1 (746 F. 2d 993 (3rd Cir. 1984).), A-20 and A-10 respectively.

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STATEMENT OF JURISDICTION

The statement of jurisdiction is set forth, and incorporated by reference by respondents, in the Petition for a Writ of Certiorari at page 3. Respondents however contend that Petitioners lack Article III standing to maintain this appeal.

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Petition for a Writ of Certiorari at page 4.

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COUNTER-STATEMENT OF THE CASE

Respondents incorporate Petitioners' statement of the case as set forth in Petitioners' Writ at pages 5 through 7 with the following provisos.

Respondents find Petitioners' estimate of damages in excess of one billion dollars to be totally speculative on the state of the current record. Respondents seek only those damages for increased utility rates which are directly attributable to the negligence and culpability of the defendants and which have been passed on by regulatory agencies to the rate paying public. There has been no discovery on the merits below and such an estimation at this stage of the proceedings is totally unwarranted.[2]

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2. Petitioners argue, apparently as a reason for federal court jurisdiction in this case, that "increased electric rates at issue here far exceed one billion dollars." (Petition, p. 12). This large amount, it is argued further, if awarded in this litigation "could directly affect the United States Treasury as well as the finances of all other utilities operating nuclear reactors . . ." Further, the question of how much damages would be proved at trial in this case is speculative at this point and hardly seems a sound basis for Federal Court jurisdiction. The amount of damages will certainly not be the same as the rate increases cited by Petitioners as "at issue here." (Petition, p. 12 and especially footnote 7, citing Petitioners' Appendix at A-58). Some part of those rate increases have nothing to do with Petitioners' misconduct and the resulting damages to Respondents.

Respondents have brought suit and charged the defendants with negligence stemming from their culpability in connection with the Three Mile Island disaster, which caused the regulatory agencies of the Commonwealth of Pennsylvania and the State of New Jersey to pass on increases in utility rates to the consumming public. These regulatory agencies could not and indeed did not consider the culpability of the defendants when approving the rates. Indeed, several of the petitioners, Babcock & Wilcox Co., J. Ray McDermott & Co., Catalytic, Inc., and Burns & Roe, Inc., are not utilities and were not ever arguably subject to the jurisdiction of the utility commissions nor involved in rate making.[3] The Third Circuit Court of Appeals, having now spoken with regard to a lack of federal subject matter jurisdiction, the transfer provision of 42 Pa.C.S. § 5103, should now apply so that this suit can be orderly and effectively transferred to a state court in Pennsylvania for disposition in accordance with state law.

Contrary to Petitioners' contentions at page 5 of their Petition, these actions will not start anew but will now continue to be litigated in the state courts.

For reasons previously set forth by the Third Circuit Court of Appeals in their opinion, and by respondents at a later point in this response, the state courts are quite capable of applying state law to these causes of action subject to the financial protection provisions of the federally created Price-Anderson Act.

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3. As to these petitioners, traditional state tort law principles apply for any damages stemming from their culpable conduct, without reference to the intervening rate approvals of the regulatory commission.

REASONS FOR DENYING THE WRIT

This action was one of many actions brought in the aftermath of the Three Mile Island incident. Many of the actions, indeed those brought by present counsel for respondents, were originally commenced in state court and removed to the Federal District Court by petitioners. At that time, federal jurisdiction was asserted pursuant to their being a so-called "extraordinary nuclear occurrence" in accordance with 42 U.S.C. §§ 2014(j), 2210(n). Subsequent to their removal, the NRC determined there was not an "extraordinary nuclear occurrence." The actions remained in federal court in accordance with the district court's opinion in *In Re Three Mile Island Litigation*, 87 F.R.D. 433 (M.D. Pa. 1980). This suit was subsequently commenced in the Federal District Court relying on that opinion as a basis for federal jurisdiction.[4]

The Third Circuit Court of Appeals has found a lack of "arising under" jurisdiction and this cause of action is now capable of being transferred to the state court where it rightfully should have been brought. This is in keeping with the legislative history of the Price-Anderson Act, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *Commonwealth of Pennsylvania, et al. v. General Public Utilities Corp., et al.*, 710 F. 2d 117 (3rd Cir. 1983), and the Petitioners' prior positions in this litigation and other litigations, wherein they always contended that federal common law does not apply and that the actions are brought and governed by traditional state law.

Further, petitioners are the prevailing parties in the federal proceedings. As such, they lack standing to cha!-

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4. A state protective action was not necessary to protect state jurisdiction because of the existence of 42 Pa.S.C. § 5103.

lenge the ruling below, and are simply seeking an advisory opinion from this High Court for the industry in the event of a hypothetical future nuclear disaster or occurrence.

A.

The Petitioners, are prevailing parties, the claims of the plaintiff-respondents having been dismissed by the Third Circuit Court of Appeals. As such, they lack standing to maintain the instant petition. It is indeed hornbook law that a party may not appeal from a judgment or decree in their favor which is not necessary to support the final order of dismissal. *Electrical Fittings Corporation, et al. vs. Thomas & Betts Co., et al.,* 307 U.S. 860 (1939).

Petitioners are not aggrieved by the judgment of the Court below in that they have prevailed. As such, their appeal is not proper. *In Re Glenn W. Turner Enterprises Litigation,* 521 F. 2d 775 (3rd Cir. 1975).

Petitioners in the instant case simply seek an advisory opinion from this Court with regard to a determination in their favor.

Petitioners may have well-intentioned practical motives in that they represent the insurance compensation structure established by the Price-Anderson Act. They seek review to establish federal jurisdiction in the event of a future nuclear disaster or incident. However well-intentioned the instant writ is from a practical and sound business point of view of the insureds, it runs afoul of sound principles of jurisdprudence founded in Article III of the Constitution which is the oldest and most consistent thread in the federal law of justiceability. Simply put, advisory opinions are not to be rendered. *Flast v. Cohen,* 392 U.S. 83 (1968); *Bodkin v. United States,* 266 F. 2d 55 (2nd Cir. 1959).

B.

The Petitioners will not be prejudiced by allowing this case to proceed in the Pennsylvania state court.

Although, because of the district court's finding of jurisdiction, early on in the related litigations these matters have been proceeding in the federal system, defendants are in no different position by a transfer to the state court pursuant to 42 Pa.C.S. § 5103 at this time than they would have been if the related state court actions originally filed shortly after the occurrence had been removed to federal court and had then been immediately remanded to state court. Such orders of remand are not subject to appeal.[5]

Petitioners' desire to concentrate all litigation in one forum and their concern over the loss of a single forum by virtue of different state courts hearing these claims is misplaced. The Pennsylvania state courts have the ability to transfer like cases to one jurisdiction for disposition. Pa.R.C.P. 213(e) (2).

Further, the Pennsylvania state courts, under conflict of laws principles, can apply New Jersey law with regard to those issues in the instant case which are peculiar to New Jersey. *Griffith v. United Airlines, Inc.*, 416 Pa. 1, 203 A. 2d 796 (1964).

Indeed, since petitioners' (see subsection C below) and all courts who have considered the choice of law in a Price-Anderson context have uniformly found the appli-

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5. 28 U.S.C. § 1447(d); *Gravitt Etc., et al. v. Southwestern Bell Telephone Company, et al.*, 430 U.S. 723 (1977), rehearing denied, 431 U.S. 975 (1977); *Volvo of America Corp. v. Schwarzer*, 429 U.S. 1331 (1976), *c.f. Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

cation of state law principles to govern the Pennsylvania state courts will not have to draw educated guesses as to what Pennsylvania law is. A federal court applying state law may have to not only draw educated guesses as to New Jersey law but also as to Pennsylvania law. Indeed, the state systems are thus more suited for resolution of these claims.

C.

Petitioners, since the inception of this and related Three Mile Island litigations, have consistently argued for the application of state law principles within the Price-Anderson context. Indicative of this approch is their summary of argument presented to the United States Court of Appeals for the Third Circuit in the instant case.[6] Indeed, where plaintiffs in related cases cried for the application of federal common law, the petitioners effectively parried the same and gained court approval of their views. *Commonwealth of Pennsylvania, et al. v. General Public Utilities Corp., et al., supra.*[7]

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6. Set forth at A. 1 through A. 2 in the Appendix to this response.

7. In accord are the opinions in the instant case rendered by the Magistrate at A-15 of Petitioners' Appendix and the Third Circuit Court of Appeals at A-3 through A-9 of Petitioners' Appendix (746 F. 2d 993 (3rd Cir. 1984)). Further evidencing the strong tradition of applying state law in the context of a Price-Anderson claim is *Silkwood v. Kerr-McGee Corp.,* 104 S.Ct. 615 (1984) and *Duke Power Co., supra.*

That the courts have opted for the application of state law comes as no surprise in light of the clear congressional legislative history which dictates the same. S. Rep. No. 296, 85th Cong., 1st Sess. 9, reprinted in 1957 U.S. Code Cong. and

(Continued on following page)

Against this backdrop, the Third Circuit held (Petitioners' Appendix at A-9, 746 F. 2d at 997) that plaintiffs' federal law claims were "wholly insubstantial" and provided no basis for federal jurisdiction citing *Bell v. Hood*, 327 U.S. 678 (1946).

(Continued from previous page)

Admin. News 1803, 1810; S. Rep. No. 1605, 89th Cong., 2nd Sess. 6, reprinted in 1966 U.S. Code Cong. and Admin. News 3201, 3206; S. Rep. No. 1605, 89th Cong., 2nd Sess. 9, reprinted in 1966 U.S. Code Cong. and Admin. News 3201, 3209.

Respondents in this case seek *damages* for the harm done by Petitioners' misconduct (as alleged in the Complaint), measured by the difference in electric rates caused by that misconduct. Respondents rely on numerous cases decided by the Pennsylvania Courts accepting jurisdiction for such claims and accepting this measure of damages as proper where a cause of action in contract or tort under state law *involving a utility* is properly alleged under state law.

As succinctly stated by the Pennsylvania Courts:

> "Jurisdiction over suits for damages based on negligence or breach of contract wherein a utility's performance of its legally imposed and contractually adopted obligations are examined and applied to a given set of facts is in the Courts."

Bell Telephone Company v. Pa. PUC, 53 Pa. Comwlth. Ct. 241, citing *Feingold v. Bell Telephone Co.*, 477 Pa. 1, 383 A. 2d 791 (1978) and *Behrend v. Bell Telephone Co.*, 242 Pa. Super. 47, 59 (1976), vacated and remanded 473 Pa. 320, 374 A. 2d 536 for consideration of validity of limitations provisions. *See also, e.g., Byer v. People's Natural Gas Co.*, 251 Pa. Super. 75 (1977). Obviously, liability of the non-utility defendants is governed by traditional tort principles.

Respondents, therefore, wish to point out that the question of whether damages are recoverable for misconduct resulting in an increase in utility costs to customers is an issue wholly to be determined under state law. It should be noted that the District Court in this case never addressed itself to any of these state law cases while at the same time declaring that the Price-Anderson Act "does not of itself define or create any causes of actions." (Petitioners' Appendix at A-15).

The only connection the instant litigation has with the federal system is the implementation of the compensation scheme of Price-Anderson. As the Third Circuit so explicitly stated this in and of itself does not show that plaintiffs' original cause of action arises under the laws of the United States. (See Petitioners' Appendix at A-5, A-6, 746 F. 2d at 996).[8]

CONCLUSION

The Petition for a Writ of Certiorari should be denied in that Petitioners lack standing and simply seek an advisory opinion of this High Court. The basis of Petitioners' position is also devoid of merit as "arising under" jurisdiction cannot be invoked by virtue of the fact that the Price-Anderson Act dictates the application of state law principles, which are best left to state courts to resolve.

Respectfully submitted,

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8. Indeed, state courts have traditionally utilized federal limitation statutes in adjudicating manners. See specifically, state court administration of the limitation of liability statute with regard to maritime causes of action when the state court has original jurisdiction. *Langnes v. Green*, 282 U.S. 531 (1931). State courts can also adjudicate federal claims. *Miller v. Reading Co.*, 292 Pa. 44 (1927) (Federal Safety Appliance Act); *Commonwealth v. Creamer*, 464 Pa. 2 (1975) (Civil Rights Act of 1871); *Charles Dowd Fox Co. v. Courtney*, 368 U.S. 502, 7 (1962) (Labor Management Relations Act Opinion).

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APPENDIX

II. SUMMARY OF ARGUMENT

Under the Price-Anderson Act system of compensation, the first tier of analysis in determining the right of claimants to relief looks to state law as the source of the applicable rules of decision. In this case, the plaintiffs, in order to establish a right to relief, were required to demonstrate that a claim would lie under Pennsylvania tort law for recovery of the increases in price which they, as ratepayers, have paid for electricity since the Three Mile Island accident.

Under Pennsylvania tort law, there are at least three independent reasons why such relief is not available. First, in the circumstances of this case no legal right of plaintiffs was infringed such as to give rise to a right to relief. Plaintiffs have no "right" to purchase electricity at rates other than those found just and reasonable by order of the two state regulatory agencies here involved. Second, because of the circumstances intervening between damage to the Unit 2 reactor and the later higher rates plaintiffs paid (including intervening regulatory decisions), plaintiffs cannot establish the element of causation, as a matter of law. And third, the kind of price increase recovery which they seek, which is non-parasitic to any physical or personal injury, is not available as a matter of law.

While in certain cases, the Price-Anderson Act might alter the rules of recovery otherwise nominally afforded under state law, this is not such a case. The result here under state law is consistent with the Price-Anderson Act, as evident from the Act itself and its legislative history.

Contrary to plaintiffs' weak suggestion to the contrary, there are no disputed issues of material fact which impede the granting of summary judgment in the present action. Accordingly this court should affirm dismissal of plaintiffs' claims.